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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 934

JAMES GILBERT GLASS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

James Gilbert Glass, petitioner, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on April 13, 1960.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is set forth in full in the Appendix to this petition. It is likewise set forth in full in the certified copy of the record filed in this Court. The judg-

ment of the United States Court of Appeals likewise appears in said certified copy. Said opinion has not as yet been reported. The opinion of the United States Court of Appeals for the Seventh Circuit affirmed the judgment entered by the United States District Court for the Northern District of Indiana, Hammond Division.

There was a trial by jury in this case and a verdict of guilty at the end of the trial.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered April 13, 1960. No petition for rehearing was filed. This petition for certiorari is filed within 30 days after the issuance of the opinion by the Seventh Circuit Court of Appeals.

The judgment of this Court is invoked under 28 U.S.C.A. Section 1254(1) and rule 19 Section 1B of the rules of the Supreme Court of the United States.

QUESTIONS PRESENTED.

1. Whether the United States District Court had jurisdiction to try the petitioner on count one or two of the indictment.

2. Whether or not the rights of the petitioner under the Fourteenth Amendment and the Due Process Clause were violated by the District Court in requiring the petitioner to stand trial under the void indictment.

3. Whether or not the admission of certain telephone conversations into evidence against the petitioner denied him Due Process of Law upon his trial.

STATEMENT OF CASE.

The indictment in this case was in two counts. The first count alleged that on or about the 7th day of July, 1959, in the Northern District of Indiana, James Gilbert Glass and Emma Johnson did knowingly, wilfully, feloniously and unlawfully sell, dispense and distribute a quantity of a narcotic drug, to-wit: 6 grams and 250 milligrams of heroin hydrochloride, for the sum of $240.00, to Anthony D. Johnson, which said quantity of heroin hydrochloride was then and there not from the original stamped package, in violation of Section 4704(a) of Title 26 of the United States Code Annotated.

The second count charged that at the same time and place petitioner did knowingly, wilfully, feloniously and fraudulently, receive, conceal, buy, sell and facilitate the transportation, concealment and sale of a quantity of narcotic drug, to-wit: 6 gram and 250 milligrams of heroin hydrochloride, after said quantity of heroin hydrochloride had been imported into the United States and knowing said quantity of heroin hydrochloride to have been imported into the United States contrary to law, in violation of Section 174, Title 21 of the United States Code.

The petitioner pleaded not guilty, was tried by a jury, which jury returned a verdict of guilty. Thereupon petitioner was sentenced to 5 years in the custody of the Attorney General of the United States under count one and to 20 years in the custody of the Attorney General of the United States under count two. The sentences to run consecutively. Appropriate motions for judgment of acquittal; for new trial, and to vacate the judgment were properly made but overruled.

The government's evidence was that one Anthony Johnson, a federal narcotics agent, and Luther McDaniel, a so-called special employee, drove to Gary, Indiana on July 7, 1959. That about 9:30 P.M. a telephone call was placed to petitioner's telephone number in Chicago, the special employee making the call in close proximity to the treasury agent, Anthony Johnson. An unknown voice answered. Then according to the government's testimony petitioner came to the telephone and identified himself as "Gilbert". The federal agent, Anthony Johnson, who had never heard petitioner's voice over the telephone before but who claimed to have talked with him for about three hours a week previously, claimed to recognize the voice as that of petitioner. This telephone call was carried out with both the special employee and the United States treasury agent allegedly listening in and talking to petitioner simultaneously, both men using the same instrument at the same time.

In the Seventh Circuit Court of Appeals, as will be noted in the opinion hereto attached, petitioner attacked the validity of count two of the indictment to charge a crime under the proper statute. The Court of Appeals ruled that while count one was a nullity, count two sufficiently set forth the crime as enunciated in the statute.

In the Court of Appeals petitioner strongly urged that the verdict of the jury and judgment of the District Court must fall away and be of no force and effect because of the failure of count two to state a crime. Because count two of the indictment failed to allege one of the essential elements of the offense—that the narcotics in which petitioner is alleged to have dealt had in fact been brought into the United States *contrary to law*.

Petitioner denied having engaged in the telephone conversations upon the trial and denied talking with the agent or the so-called special employee about narcotics even though he admitted making a trip to Gary, Indiana.

Petitioner attacked the validity of the sentence in the Court of Appeals for the first time, basing his attack upon his belief that, the indictment charging no crime, was a nullity and could be attacked at any time even in the Supreme Court of the United States. The Court of Appeals reversed as to count one but affirmed as to count two.

In order to convict petitioner in the first instance and have the conviction be affirmed by the Court of Appeals in the second instance it was absolutely necessary that the indictment under which petitioner was tried charge a crime under the statute. This, petitioner claims was not the case. The Court of Appeals traveled the first mile in reversing the sentence as to count one but as to count two, the count upon which the longest sentence was imposed, the Court of Appeals affirmed.

REASON FOR GRANTING THE WRIT.

Certiorari is prayed for on three basic grounds; numbers one and two may be consolidated and number three will be enlarged upon separate and distinct from the first two.

I.-II.

IN ALL PROSECUTIONS FOR CRIME THE INDICTMENT MUST, UPON ITS FACE, SHOW THAT THE DEFENDANT IS CHARGED WITH A CRIME. HE IS CALLED TO ANSWER TO THE CHARGE AGAINST HIM AND FOR NOTHING ELSE.

Count two of the indictment in this case is in words and figures as follows:

The Grand Jury further charges:

On or about the 7th day of July, 1959, in the Northern District of Indiana, James Gilbert Glass and Emma Johnson did knowingly, wilfully, feloniously and fraudulently, receive, conceal, buy, sell, and facilitate the transportation, concealment and sale of a quantity of narcotic drug, to-wit: 6 gram and 250 milligrams of heroin hydrochloride, *after said quantity of heroin hydrochloride had been imported into the United States* and knowing said quantity of heroin hydrochloride to have been imported into the United States contrary to law, in violation of Section 174, Title 21 of the United States Code. (Emphasis added)

A True Bill.

Petitioner wishes to call to the Court's attention the statute upon which the above count is bottomed. Section 174, Title 21, United States Code provides as follows:

"Whoever . . . imports . . . any narcotic drugs into the United States . . ., *contrary to law*, or (deals with it) . . . after being imported . . . knowing the same to have been imported . . . *contrary to law*, or conspires to commit any of such acts . . . shall be imprisoned . . . " (emphasis supplied).

Patently, and upon its face, Count two of the indictment is legally insufficient and this court has so held in a case involving the same contention, the same being *United States v. Cook*, 17 Wall. (84 U.S.) 168, 21 L.Ed., 538, 539.

It would seem to petitioner as if a long citation of cases is not necessary, for this case can be decided upon reason alone: the indictment failed to charge a crime and all prior proceedings are null and void and should be wholly for nothing esteemed.

III.

THE CLAIM OF THE AGENT THAT HE, SIMULTANEOUSLY WITH ANOTHER MAN LISTENED OVER THE PHONE AND RECOGNIZED A VOICE THAT HE HAD NEVER PREVIOUSLY HEARD OVER THE TELEPHONE IS UNBELIEVABLE.

A case embodying evidence similar to that herein complained against was heard by this court and reversed without remanding in *Washington* v. *United States*, 357 U.S. 348.

It would seem to be a physical impossibility for the evidence to have been gathered in the manner claimed by the Federal Police officer and petitioner believes he is entitled to an examination of the record by this court on that ground alone.

Petitioner is now in the custody of the Attorney General of the United States and is serving time at the Federal Penitentiary at Leavenworth, Kansas. Petitioner respectfully believe that he should be speedily given a hearing for a final determination of the questions presented.

CONCLUSION.

Because of the above, petitioner earnestly prays that the writ be granted.

Respectfully submitted

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APPENDIX.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1959—APRIL SESSION, 1960

No. 12769

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JAMES GILBERT GLASS,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

April 13, 1960

Before KNOCH and CASTLE, *Circuit Judges*, and PLATT, *District Judge*.

KNOCH, *Circuit Judge*. Defendant, James Gilbert Glass, jointly with one Emma Johnson, was charged in a two-count indictment with (1) selling heroin in violation of Title 26, U.S. Code, Section 4704, and (2) with knowingly receiving etc. narcotics in violation of Title 21, U.S. Code, Section 174.

A jury found defendant Glass guilty as charged. He was sentenced to serve five years' imprisonment on Count One and twenty years' imprisonment on Count Two, the sentences to be served consecutively. This appeal followed.

Defendant sets out the contested issues as whether:

> "1. The trial court erred in denying defendants motions for judgment of acquittal at the close of the government's case, and at the close of all the evidence because:
>
> > "a. Evidence produced by the government in support of this case violated the constitutional rights of the defendant.
> >
> > "b. Such proof as was adduced against him was illegally admitted in evidence for the reason that it was admitted under count 2 of the indictment which alleged no offense against the United States."

No issue has been raised as to Count One. However, this Court may consider plain errors affecting substantial rights even though these have not been brought to the attention of the Court. Rule 52(b), Federal Rules of Criminal Procedure. Thus, in the light of this Court's recent opinion in Appeal No. 12810, *United States* v. *James Cromwell Bailey* (April 13, 1960), we find that Count One, which is identical in every respect with Count One in the *Bailey* case, fails to state an offense. It does not allege selling of the narcotic drug as being neither from nor in the original stamped package, but only as not "from" the original stamped package.

Defendant argues that the judgment of the Trial Court must be reversed as to Count Two of the indictment because Count Two fails to allege an offense against the United States; that conviction on that Count is a nullity because it fails to allege one of the essential elements of the offense—that the narcotics in which defendant is alleged to have dealt had, in fact, been brought into the United States contrary to law.

Count Two of the indictment reads:

> "On or about the 7th day of July, 1959, in the Northern District of Indiana, James Gilbert Glass

and Emma Johnson did knowingly, wilfully, feloniously and fraudulently receive, conceal, buy, sell, and facilitate the transportation, concealment and sale of a quantity of narcotic drug, to-wit: 6 grams and 250 milligrams of heroin hydrochloride, after said quantity of heroin hydrochloride had been imported into the United States and knowing said quantity of heroin hydrochloride to have been imported into the United States contrary to law, in violation of Section 174, Title 21 of the United States Code annotated."

We also considered this precise issue in *Bailey, supra.* There we held that Title 21, U.S.C., Section 174, contained two offenses: (1) to import or bring any narcotic drug into the United States contrary to law; and (2) to sell any narcotic drug after its being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law.

In *Bailey*, as here, we note that the indictment reads exactly on the statute and charges the second offense, no element being omitted.

As the Court said in *Brown* v. *United States*, (9 Cir., 1955) 222 F. 2d 293, 296:

> "In logic it would appear that if defendants knew the drugs were imported contrary to law, the fact that they actually were imported contrary to law is inherent therein."

The evidence adduced in the case before us indicated that Federal Narcotics Agent Anthony Johnson and Special Employee Luther McDaniel drove to Gary, Indiana, on July 7, 1959. At about 9:30 P.M., a telephone call was placed to defendant's telephone number in Chicago, in the hearing of Agent Johnson. An unknown voice answered. Then defendant came to the telephone and identified himself as "Gilbert". Agent Johnson recognized the voice of defendant, whom he knew, having spoken with him for about three hours on July 1, 1959. Agent Johnson said that he wanted to buy narcotics and gave his location in

Gary. Defendant directed him to another location and promised to meet him there. At about 10:50 P.M. defendant, whom Agent Johnson recognized, drove up to the agreed place. Agent Johnson and Special Employee McDaniel got into the defendant's automobile, which Agent Johnson also recognized from having seen it before. While they drove about in Gary, Agent Johnson and defendant agreed on a sale of three ounces of narcotics for $240.00 which Agent Johnson paid defendant in currency, the serial numbers of which had been previously recorded. Defendant directed Agent Johnson to the apartment of Emma Johnson, who would give him the narcotics. Agent Johnson asked defendant to wait. After securing a tinfoil package from Emma Johnson at the designated place, Agent Johnson went back to meet defendant, who gave him instructions about diluting narcotics for resale. In her testimony, Emma Johnson denied that Agent Johnson had come to her apartment. She said that she had never seen him prior to the time of trial in court.

After leaving defendant, Agent Johnson joined other agents. A preliminary field test showed the tinfoil package to contain opiates. This test was confirmed by subsequent laboratory analysis to which a government chemist testified.

Other narcotics agents testified to the meeting in Gary between Agent Johnson and defendant.

Agent Joseph Dino, Jr., testified that on arrest defendant was found to have in his possession five $20 bills of the same serial numbers as those previously recorded and given to Agent Johnson to make the purchase.

In his testimony, defendant denied the telephone conversation, stating that he had come to Gary independently to gamble there; that he had recognized Special Employee McDaniel standing on the sidewalk. When McDaniel expressed a desire to talk with defendant, defendant had picked up McDaniel and McDaniel's companion, who was unknown to defendant, and had driven them about while he looked for a parking place; that there was no sale of narcotics; and that in response to a veiled inquiry from

McDaniel regarding narcotics, defendant had said "You know more about that than me." Defendant said he then went on to gamble at a succession of gambling games where he won a specified sum of money.

Defendant contends that the Trial Court improperly admitted testimony of the telephone call as it constituted a conversation outside of defendant's presence. The call was placed in Gary to a long distance operator to whom the number had to be verbally given, in the hearing of Agent Johnson. Agent Johnson did testify that during the conversation he shared the receiver with McDaniel for at least part of the time. However, he also testified that he was able to hear and to identify the voice at the other end as that of defendant, although he had never heard defendant's voice over the telephone before. Defendant contends that the factual situation here resembles that in *United States* v. *Washington* (1958) 253 F. 2d 913, of which Judge Duffy of this Court said that it was unbelievable that two agents and one other person all simultaneously listening to a 35-word, 12-second conversation, at one telephone receiver, could have identified the defendant's voice, which neither agent had ever heard before. In the case before us, however, only two persons were listening together. The conversation here was a much longer one. Although Agent Johnson had not previously heard defendant's voice over a telephone, he had spent three hours in defendant's company about a week before. Thus Agent Johnson was not relying on the mere oral statement made by the party at the other end of the line as to his identity. Other facts also supported the identification. It was defendant's telephone number which was requested of the operator. The parties arranged a meeting and defendant did appear at the designated place. Admission of Agent Johnson's testimony concerning the telephone conversation was proper. *United States* v. *Carr*, (7 Cir., 1955) 219 F. 2d 876, 878-79; *United States* v. *Bucur* (7 Cir., 1952) 194 F. 2d 297, 303-4.

The judgment of the Trial Court is AFFIRMED as to Count Two, and REVERSED as to Count One.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Wednesday, April 13, 1960

Before

Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge
Hon. Casper Platt, District Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JAMES GILBERT GLASS, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

No. 12769

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED as to Count Two and REVERSED as to Count One, in accordance with the opinion of this Court filed this day.